August 24, 1998

D.T.E. 97-120-3

Petition of Western Massachusetts Electric Company pursuant to General Laws Chapter 164, §§ 76 and 94, and 220 C.M.R. §§ 1.00 et seq., for review of its electric industry restructuring proposal.

APPEARANCES:

Stephen Klionsky, Esq.
260 Franklin Street, 21st Floor
Boston, Massachusetts 02110-3179
and
Jay E. Gruber, Esq.
Jeffrey F. Jones, Esq.
Joseph L. Laferrera, Esq.
Palmer & Dodge
One Beacon Street
Boston, Massachusetts 02108
FOR: WESTERN MASSACHUSETTS ELECTRIC COMPANY
Petitioners

L. Scott Harshbarger, Attorney
By: Joseph W. Rogers
Assistant Attorney General
200 Portland Street
Boston, Massachusetts 02114

Robert F. Sydney, Esq.
Division of Energy Resources
100 Cambridge Street, Room 1500
Boston, Massachusetts 02202
and
MaryBeth Gentleman, Esq.
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109-2170
FOR: COMMONWEALTH OF MASSACHUSETTS, DIVISION OF ENERGY RESOURCES
Intervenor

Jerrold Oppenheim, Esq.
National Consumer Law Center, Inc.
18 Tremont Street, Suite 400
Boston, Massachusetts 02108
FOR: THE LOW-INCOME INTERVENORS
Intervenor

Peter W. Brown, Esq.
David K. Wiesner, Esq.
Brown, Olson & Wilson
501 South Street
Concord, New Hampshire 03304
FOR: TRACTEBEL POWER, INC.
Intervenor

Scott J. Mueller, Esq.
Patricia M. French, Esq.
LeBoeuf, Lamb, Greene & MacRae
260 Franklin Street
Boston, Massachusetts 02110
FOR: FITCHBURG GAS & ELECTRIC LIGHT COMPANY
Intervenor

John Cope-Flanagan, Esq.
COM/Energy Services Company
One Main Street
P.O. Box 9150
Cambridge, Massachusetts 02142-9150
and
Robert N. Werlin, Esq.
David S. Rosenzweig, Esq.
Keegan, Werlin & Pabian, L.L.P.
21 Custom House Street
Boston, Massachusetts 02110
FOR: CAMBRIDGE ELECTRIC LIGHT COMPANY, COMMONWEALTH ELECTRIC COMPANY, CANAL ELECTRIC COMPANY
Intervenors

Alan R. Johnson
2000 West Park Drive, Suite 300
Westborough, Massachusetts 01581
FOR: ENERGY EXPRESS, INC.
Intervenor

Jeffrey M. Bernstein, Esq.
Charles Harak, Esq.
Suzanne LaMantia, Esq.
Bernstein, Cushner & Kimmell, P.C.
One Court Street, Suite 700
Boston, Massachusetts 02108
FOR: MASSACHUSETTS ALLIANCE OF UTILITY UNIONS
Intervenor

John A. DeTore, Esq.
Maribeth Ladd, Esq.
Rubin & Rudman
50 Rowes Wharf
Boston, Massachusetts 02110-3319
FOR: ENRON ENERGY SERVICES COMPANY
Intervenor

William S. Stowe, Esq.
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199
FOR: BOSTON EDISON COMPANY
Intervenor

William H. O'Rourke
57 Observer Street
Springfield, Massachusetts 02144
FOR: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 455
Intervenor

Paul W. Gromer, Esq.
77 North Washington Street
Boston, Massachusetts 02114-1908
FOR: NORTHEAST ENERGY EFFICIENCY COUNCIL
Intervenor

Mark E. Bennett, Esq.
62 Summer Street
Boston, Massachusetts 02110-1016
FOR: CONSERVATION LAW FOUNDATION
Intervenor

Andrew J. Newman, Esq.
Rubin & Rudman
50 Rowes Wharf
Boston, Massachusetts 02110-3319

FOR: WESTERN MASSACHUSETTS INDUSTRIAL CUSTOMERS GROUP
Intervenor

Nicholas J. Scobbo, Jr., Esq.
Robert M. Granger, Esq.
Ferriter, Scobbo, Caruso & Rodophele
75 State Street, 7th Floor
Boston, Massachusetts 02108

FOR: MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY
Intervenor

Robert Ruddock, Esq.
Judith Silvia, Esq.
Associated Industries of Massachusetts
222 Berkeley Street, P.O. Box 763
Boston, Massachusetts 02117

FOR: ASSOCIATED INDUSTRIES OF MASSACHUSETTS
Intervenor

David A. Fazzone, Esq.
Doron F. Ezickson, Esq.
Laura S. Olton, Esq.
Emily E. Smith-Lee, Esq.
McDermott, Will & Emery
75 State Street
Boston, Massachusetts 02109

FOR: EASTERN EDISON COMPANY
Limited Participant

INTERLOCUTORY ORDER ON THE APPEAL OF THE ATTORNEY GENERAL OF THE HEARING OFFICER RULING REGARDING PREFILED TESTIMONY

I. INTRODUCTION

On December 31, 1997, Western Massachusetts Electric Company ("WMECo" or "Company") submitted a restructuring plan ("Plan") to the Department of Telecommunications and Energy ("Department") pursuant to "an act relative to restructuring the electric utility industry in the Commonwealth, regulating the provision of electricity and other services, and promoting enhanced consumer protection therein" ("Act"), St. 1997, c. 164. The Department has docketed this matter as D.T.E. 97-120.[1] On February 19, 1998, the Department issued an Initial Order, subject to further review and reconciliation, approving the Company's Plan. Western Massachusetts Electric Company, D.T.E. 97-120 (1998). On May 15, 1998, the Company submitted proposed Amendments ("Amendments") to the Plan.

On July 22, 1998, the Department conducted a procedural conference in order to, among other things, establish a schedule for evidentiary hearings in this proceeding. At the procedural conference, the Attorney General of the Commonwealth ("Attorney General")

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[1] The Department received notice of intervention from the Attorney General of the Commonwealth pursuant to G.L. c. 12, § 11, and granted the petitions to intervene from Associated Industries of Massachusetts; Boston Edison Company; Cambridge Electric Light Company, Canal Electric Company, and Commonwealth Electric Company; Conservation Law Foundation; the Division of Energy Resources; EnergyExpress, Inc.; Enron Energy Services; Massachusetts Energy Directors Association, Massachusetts Community Action Association, Massachusetts Senior Action Council, and Cape Organization for Rights of Disabled; Massachusetts Alliance of Utility Unions; Massachusetts Municipal Wholesale Electric Company; Northeast Energy Efficiency Council; Tractebel Power, Inc.; Unitil/Fitchburg Gas and Electric Light Company; General Electric Company; International Paper Company, Mead Corporation, Schweitzer-Maudit International, Inc., and Solutia, Inc.; International Brotherhood of Electrical Workers, Local 455; and Temple Beth El and Kodimoh Synagogue. The Department also granted the petition for limited participation of Eastern Edison Company.

stated that, with the proposed Amendments, the Company should be required to submit prefiled testimony in support of its Plan (July 22, 1998 Tr. at 47-48). The Hearing Officer stated that the Company would not be required to file prefiled testimony. The Attorney General indicated that he intended to appeal the Hearing Officer ruling, and the Hearing Officer stated that an appeal to the Commission was due by July 29, 1998 (id. at 56).

The Attorney General has previously requested that the Company be required to submit prefiled testimony. At a procedural conference conducted by the Department on February 9, 1998, the Attorney General requested that the Company be required to submit prefiled testimony (February 9, 1998 Tr. at 41). The Hearing Officer stated that prefiled testimony would not be required from the Company at this point in the proceeding, and that information regarding the Company's Plan would be obtained through discovery (id. at 56).[2] In addition, at a procedural conference conducted by the Department on March 19, 1998, the Hearing Officer stated that prefiled testimony had not been required, and that the Company would be expected to sponsor witnesses to provide testimony and be available for cross examination (March 19, 1998 Tr. at 44). At a prehearing conference conducted by the Department on May 7, 1998 to discuss the proposed Amendments, the Attorney General indicated that he sought prefiled testimony from the Company (May 7, 1998 Tr. at 49-50). The Hearing

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[2] The Hearing Officer also requested an identification of issues to be raised by parties to the proceeding, and in response to issues raised by the parties, a list of witnesses from the Company to respond to the issues raised by the parties (id. at 51).

Officer stated that prefiled testimony had not been required by the Company and would not be required at this point in the proceeding (id. at 69).[3]

On July 29, 1998, the Attorney General appealed the Hearing Officer's July 22, 1998 ruling ("Attorney General's July 29, 1998 Appeal"). On August 3, 1998, Associated Industries of Massachusetts ("AIM") filed comments in support of the Attorney General's July 29, 1998 Appeal ("AIM August 3, 1998 Comments"). On August 4, 1998, WMECo submitted a response to the Attorney General's July 29, 1998 Appeal ("WMECo's August 4, 1998 Response"). On August 14, 1998, WMECo submitted comments indicating that it intended to submit prefiled testimony.

II. POSITIONS OF THE PARTIES

A. Attorney General

The Attorney General contends that the Hearing Officer erred in not requiring WMECo to submit prefiled testimony in support of its petition for approval of the Plan. The Attorney General makes two arguments in support of his position: first, that Department precedent requires the Company establish its prima facie case with prefiled testimony (Attorney General's July 29, 1998 Appeal at 6-7); and second, even if the Department's prior practice does not require prefiled testimony in all cases, given the complexities of this proceeding, that the Hearing Officer erred when he denied the Attorney General's request that the Company be directed to submit prefiled testimony (id. at 7-9). The Attorney General states that the burden

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[3] In addition to comments on the proposed Amendments, the Hearing Officer requested parties to submit proposals for a procedural schedule for review of the Company's Plan (id. at 72).

of production is on the Company, and that the Department must ensure that utility companies be allowed to recover only verifiable, prudent, and reasonable stranded costs (id.). The Attorney General contends that he is entitled to be given notice of all the issues involved, and to be accorded a reasonable opportunity to prepare and present evidence and argument (id.).

B. AIM

AIM states that prefiled testimony is necessary so that customers, who will ultimately pay any approved transition charge, will have the opportunity to meaningfully prepare and present evidence concerning whether unrecovered costs associated with the nuclear generating units constitute transition costs (AIM August 3, 1998 Comments at 1).

C. WMECo

WMECo argues that the Hearing Officer correctly decided that prefiled testimony in this matter was unnecessary for three reasons: (1) the Appeal is untimely because the Attorney General should have appealed the Hearing Officer's ruling the first time it was rendered months earlier (WMECo's August 4, 1998 Response at 3-4); (2) no controlling statutory or regulatory authority requires the submission of prefiled testimony (id. at 4-5); and 3) the Hearing Officer did not abuse his discretion because requiring prefiled testimony at this point in the proceeding would serve only to delay the hearings, and lead to the preparation and submission of materials which could only be redundant and duplicative of the already voluminous discovery submissions (id. at 5-6).

In addition, WMECo argues that the issue with respect to the establishment of a prima facie case, although "intertwined" by the Attorney General with the request for prefiled

testimony, is not properly before the Commission because it was not ruled on by the Hearing Officer at the July 22, 1998 procedural conference (id. at 2 and 6-8). Assuming, for argument's sake, that such issue is properly before the Commission, then WMECo contends that the Attorney General has the burden of proof with respect to his contention that the undepreciated balance of investments in the nuclear units is not recoverable transition costs (id. at 10-11). In support of this position, WMECo argues that no other utility restructuring plan approved by the Department required the company to demonstrate that assets had been rendered uneconomic by competition, and that, therefore, the doctrine of reasoned consistency requires that the Department act similarly here (id. at 6 and n.2). Moreover, WMECo contends that the cases cited by the Attorney General do not support his stated position (id. at 8-10), and that, at any rate, "[t]he Attorney General is at liberty to prepare and submit its own case" (id. at 10).

III. ANALYSIS AND FINDINGS

A. Timeliness of Appeal

Pursuant to 220 C.M.R. § 1.06(d)(3), "[t]he presiding officer shall prescribe a reasonable time period for the submittal of the appeal and any response." A reading of the procedural history of this proceeding leads to the conclusion that the Hearing Officer's prior statements concerning prefiled testimony were not as definitive as characterized by WMECo. The procedural schedule and manner in which to proceed were left open to amendment until the procedural conference on July 22, 1998 (See, May 5, 1998 Tr. at 70-72). Even though the Hearing Officer had made previous rulings not requiring the Company to submit prefiled

testimony, the appeal to the Commission results from the Hearing Officer ruling denying the Attorney General's July 22, 1998 request that the Company, given the proposed amendments, be required to submit prefiled testimony. At the July 22, 1998 procedural conference, the Attorney General indicated that he intended to appeal the Hearing Officer's ruling and the Hearing Officer designated a deadline for that appeal (July 22, 1998 Tr. at 56). The Hearing Officer, under a G.L. c. 25, § 4 delegation from this Commission, has acted to reopen the opportunity for appeal of an earlier procedural ruling. The Commission would need some persuasive reason to disavow the Hearing Officer's action, and no such reason is advanced here. Therefore, the Attorney General's July 29, 1998 Appeal was timely filed.

B. Necessity for Prefiled Testimony

As an initial matter, we have been unable to identify, and the Attorney General has been unable to point to, any legal requirement that petitioners in proceedings before the Department must prepare and submit prefiled testimony either to accord procedural due process or to satisfy burdens of proof. The Department's procedural rules provide the Hearing Officer with the discretion to make all decisions regarding the admission or exclusion of evidence, or any other procedural matters which may arise in the course of the proceeding. 220 C.M.R. § 1.06(6)(a). The Hearing Officer, to the extent it is deemed necessary and practicable, shall establish a fair and detailed schedule for the proceeding, including, but not limited to, discovery, the filing of testimony and briefs, in order to promote the orderly disposition of the case. 220 C.M.R. § 1.06(6)(b). Moreover, the Department's procedural rules provide the Hearing Officer with the discretion to allow prepared direct testimony of any

witness to be offered as an exhibit. 220 C.M.R. § 1.10(4). Therefore, the matter of the submission of prefiled testimony is within the discretion of the Hearing Officer.

Although prefiled testimony may be submitted in some types of proceedings, not all proceedings before the Department have required prefiled testimony. Specifically, no other electric company filed either a restructuring settlement or restructuring plan accompanied by prefiled testimony.[4] Further, the Department did not require that any previous restructuring settlement or restructuring plan be accompanied by prefiled testimony at the time of filing or supplemented by prefiled testimony after the initial filing. Prefiled testimony is a generally accepted, but not required practice before the Department. The practice is pragmatic. In some cases, observance of the practice may make for a more focused and expeditious proceeding, and for the better development of the evidentiary record. As the Department neither required, nor refused to require prefiled testimony in the other restructuring proceedings, both the Attorney General and WMECo's reliance on the principle of reasoned consistency is misplaced.[5] While WMECo does not need to submit prefiled testimony as a

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4 See, e.g., Boston Edison Company, D.P.U./D.T.E. 96-23; Eastern Edison Company, D.P.U./D.T.E. 96-24; Massachusetts Electric Company, D.P.U./D.T.E. 96-25, Fitchburg Gas and Electric Light Company, D.T.E. 97-115; Commonwealth Electric Company, Cambridge Electric Light Company, and Canal Electric Company, D.P.U./D.T.E 97-111.

5 The notion of reasoned consistency is applicable to the Department's decision-making process, not to the Hearing Officer's discretionary rulings regarding the orderly conduct of the proceeding. See Boston Gas Company v. Department of Public Utilities, 367 Mass. 92 (1975). As noted, the orderly conduct of the proceeding provides the Hearing Officer with discretion in matters relating to the admission or exclusion of evidence, or any other procedural matters which may arise in the course of the proceeding.

matter of law, the provision of such testimony would promote the conduct of an efficient proceeding and a better record in this instance.

Clearly, the Attorney General, and all other parties to the proceeding, are entitled to be fairly apprised of the issues in a case. By any standard, this is an extraordinary proceeding with a complex historical context, a new and largely un-construed statute, and filings which have been, and continue to be, updated to incorporate proposed Amendments and new business decisions. The fluidity of this situation has compounded the complexity of this proceeding and makes prefiled testimony valuable. Therefore, the Department finds that the submission of prefiled testimony, at this point in the proceeding, will promote the orderly disposition of the case. Moreover, the Company has indicated its intent to submit prefiled testimony. Prefiled testimony will assist all the parties to air the issues more completely, and aid in the better development of the evidentiary record and the quality of argument.

The Department is aware of the cost and inefficiency of open-ended delay, and therefore will require the Company to submit, no later than September 4, 1998, prefiled testimony in two areas: first, for each witness the Company intends to sponsor, WMECo shall specify the topics the witness will cover, and summarize the positions set forth be the Company, as updated by the proposed Amendments and discovery; and second, prefiled testimony should review the unrecovered fixed costs of existing generating facilities that have been determined by the Department to have been prudently incurred and that become uneconomic as a result of the creation of a competitive generation market. G.L. c. 164, § 1G(b)(1)(i).

Finally, the Department is hard pressed to understand how the Attorney General can claim that he has not been afforded a reasonable opportunity to prepare evidence and argument when he has propounded hundreds of discovery questions through the submission of sixteen rounds of information requests, including detailed questions concerning the Company's proposed witnesses, their qualifications, and their likely avenues of testimony. Therefore, while the Department now requires prefiled testimony in this proceeding, in order to not cause undue delay, parties will be under a burden to demonstrate that discovery issued pursuant to the submission of prefiled testimony could not have been issued prior to the submission of the prefiled testimony. Consistent with the mandate of G.L. c. 30A, § 11(1) sentences 3 and 4, the Hearing Officer may take such procedural and scheduling actions as are needed to keep the case moving toward the timely outcome the Legislature demanded of all restructuring investigations by the Department. G.L. c. 164, §1A(a).

IV. OTHER MATTERS

A. Motion for Summary Judgment

On June 1, 1998, the Attorney General filed comments regarding the Company's proposed Amendments' compliance with the Act ("Attorney General's June 1, 1998 Comments"). The Attorney General states that to the extent necessary to raise the issue of the recoverability of costs related to the Millstone plants in a manner that will ensure that it is resolved on a timely basis, "he hereby moves for summary judgment on their recoverability" (Attorney General's June 1, 1998 Comments at 6-7). In the Attorney General's July 29, 1998 Appeal, he restates the fact that he had moved for Summary Judgment in the June 1, 1998

Comments (Attorney General's July 29, 1998 Appeal at 3). No responses to the June 1, 1998 Comments have been filed.

Pursuant to the Department's procedural rules, "a motion for summary judgment shall set forth in detail such supporting facts as would be admissible in evidence." 220 C.M.R. § 1.06(6)(e). Even if the single statement embedded within the Attorney General's June 1, 1998 Comments constitutes a motion, the supporting facts are wholly absent. In addition, according to the Massachusetts Rules of Civil Procedure, which although not binding upon the Department do inform our decision, see, e.g., 220 C.M.R. § 1.06(6)(c) (the rules of civil procedure "shall be instructive, rather than controlling"), summary judgment shall be rendered if the filings show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. Pro. 56(c). However, based on the voluminous discovery issued in this proceeding, the Department finds that serious questions of law and fact remain to be determined in evidentiary hearings and argued on brief. Moreover, the issues raised are far too important and complex to deal with summarily. Neither the petitioner's nor the public's interest would be well served by granting the Attorney General's request. Accordingly, the Attorney General's motion for Summary Judgment is denied.

B. Motion for Directed Finding

On August 6, 1998, the Attorney General submitted a Motion for a Directed Finding ("Attorney General's August 6, 1998 Motion") seeking a finding that all costs related to Millstone Nuclear Units 1, 2, and 3 that WMECo seeks to recover in its restructuring plan do

not qualify as transition costs. The Attorney General states that the Company has not presented sufficient evidence to establish a prima facie case that demonstrates that the costs associated with the Millstone units were prudently incurred and have become uneconomic as a result of the creation of a competitive generation market (Attorney General's August 6, 1998 Motion at 1).

On August 13, 1998, the Company submitted a response in opposition to the Attorney General's August 6, 1998 Motion ("WMECo's August 13, 1998 Response"). The Company states that the Attorney General's August 6, 1998 Motion asks the Department to revisit issues already decided by the Hearing Officer and appealed to the Commission, is procedurally incorrect and unfair, and seeks to impose distinctions on WMECo's nuclear facilities that are not applied to those of other electric utilities (WMECo's August 13, 1998 Response at 1).

As pointed out by the Attorney General, an appropriate standard of review is suggested by Rule 50 of the Massachusetts Rules of Civil Procedure, which states, in relevant part, "[a] party may move for a directed verdict at the close of the evidence offered by an opponent, … [or] at the close of all the evidence" (id. at 3). The Attorney General states that if the Department is not going to require the Company to file testimony, then this is an appropriate time to test the sufficiency of the evidence presented (id.). WMECo has not rested its case, nor, indeed, have evidentiary hearings even begun. Moreover, the Department, in this Order, has required, and the Company has indicated its intent to submit prefiled testimony. Accordingly, the Attorney General's August 6, 1998 Motion is premature, and therefore, denied. In reviewing the Company's Plan, the Department will consider, in addition to

prefiled testimony, all information obtained through the discovery and cross examination process. The submission of prefiled testimony does not limit the Department's consideration of any other relevant information in review of the Company's Plan.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That Western Massachusetts Electric Company shall submit prefiled testimony in accordance with the directives of this Order.

By Order of the Department,

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Janet Gail Besser, Chair

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner